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No. 02-1711

IN THE

Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Cellular Telecommunications & Internet Association ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers.[1] Membership in the association covers commercial mobile radio service ("CMRS") providers[2] and manufac-

[1] No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its members made any monetary contribution to the preparation or submission of this brief.

[2] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial

turers. CTIA represents more broadband Personal Communications Service carriers and more cellular carriers than any other trade association. As such, CTIA is uniquely situated to represent the interests of the wireless industry with respect to the pending petition for writ of certiorari.[3]

REASONS FOR GRANTING THE PETITION

Wireless providers are an "integral part of the national telecommunications infrastructure" and, "by their nature, operate without regard to state lines." H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. Given the inherently interstate nature of wireless services and their increasing importance to the economy, Congress recognized that allowing the creation of more than fifty disparate regimes for rate and entry regulation would inhibit the wireless industry's growth, undermine competition, and harm consumers. Congress therefore expressly preempted states from regulating the rates charged by wireless carriers or their entry into the marketplace.

Congress provided states with limited jurisdiction to regulate "the other terms and conditions" of wireless services, but some states have been using this delegation as a backdoor means to assert authority over wireless rates and entry. The Public Utilities Commission of Ohio's (the "PUCO's") decision in the lawsuit below, as affirmed by the Ohio Supreme Court, is a case in point. The PUCO adjudicated a complaint

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portion of the public." 47 U.S.C. § 332(d)(1) (2003); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1443-63, 1508 (1994) ("*CMRS Second Report and Order*") (CMRS encompasses cellular service, personal communications service, paging, airplane telephone service, and certain mobile satellite services).

[3] CTIA has obtained consent from the Petitioner and the Respondent to file this brief.

alleging unreasonable rate discrimination, found that Petitioner had violated Ohio law, calculated how much the complainant had been "overcharged," and enforced a separate affiliate requirement for wholesale and retail CMRS operations. Based on the PUCO's findings, an Ohic trial court ruled that the complainant was entitled to damages in the amount of the so-called overcharges and lost profits.

Each of Ohio's decisions in this case—the PUCO's in assessing the reasonableness of Petitioner's charges, the Ohio Supreme Court's in upholding the state agency's unlawful assumption of jurisdiction, and the Ohio trial court's award of damages—while framed as the adjudication of a rate discrimination claim, is in fact tantamount to the state rate regulation proscribed by federal law. Courts and the FCC have consistently held that if a complaint challenges the reasonableness of a wireless rate—even if the claim alleges that the rate is unreasonably discriminatory—states lack jurisdiction to hear it. Moreover, as this Court has made clear, the term "rates" must be interpreted broadly because rates are significant only to the extent one knows what service is being provided in return.

Although Ohio's actions are especially blatant violations of the prohibition against state ratemaking and entry regulation, a number of other states and plaintiffs asserting state-law causes of action also have begun chipping away at the boundaries established by Congress. It was to avoid a patchwork of precisely this kind of regulation that Congress preempted states from imposing their traditional telecommunications regimes on wireless operations. Accordingly, CTIA urges this Court to grant the petition and reverse the decision of the Ohio Supreme Court.

I. STATES ARE FORBIDDEN FROM ENGAGING IN RATE REGULATION OF WIRELESS CARRIERS

A. Congress Created a New Regulatory Paradigm for Wireless Services in Section 332

Seeking to promote competition in an industry that already was exhibiting the potential for extraordinary growth and innovation, in 1993, Congress amended the Communications Act[4] "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998). The statutory amendments reduced regulation by, among other things, establishing a comprehensive and consistent national regulatory framework for the various types of wireless providers and gave the Federal Communications Commission ("FCC") flexibility to modulate the levels of regulation based on market conditions.

The most significant aspect of the 1993 changes was Congress's express preemption of states from regulating wireless rates or entry:

> Notwithstanding section[] 2(b) [which otherwise gives states jurisdiction over intrastate rates] . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A). Section 332(c)(3) demonstrates "an unambiguous congressional intent to foreclose state regulation in the first instance [and] reflects a general

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[4] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

preference in favor of reliance on market forces rather than regulation." *Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services*, Report and Order, 10 F.C.C.R. 7842, 7844 ¶ 8 (1995) ("*Ohio CMRS Order*"), *recon. denied*, Order on Reconsideration, 10 F.C.C.R. 12427 (1995). Although states may continue to regulate the "other terms and conditions" of wireless service, such residual authority is necessarily limited. To the extent a state touches on rate or entry regulation, it is not an *other* term or condition and it is not permissible.

Ohio has been rebuffed twice in its attempt to maintain jurisdiction over wireless rates, which section 332(c)(1)(B) permits only if a state can demonstrate the existence of certain conditions. *See Ohio CMRS Order*, 10 F.C.C.R. 7842.[5]

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[5] 47 U.S.C. § 332(c)(1)(B) (permitting states that regulated wireless rates before enactment of the 1993 restrictions to continue regulation if they could demonstrate to the FCC that market conditions fail to protect consumers from unjust and unreasonable rates and practices). None of the other six petitioning states was granted such approval either. *See Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana,* Report and Order, 10 F.C.C.R. 7898 (1995); *Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services; Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Report and Order and Order on Reconsideration, 10 F.C.C.R. 7824 (1995); *Petition of New York State Public Service Commission To Extend Rate Regulation*, Report and Order, 10 F.C.C.R. 8187 (1995); *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 F.C.C.R. 7486 (1995), *recon. denied*, Order on Reconsideration, 11 F.C.C.R. 796 (1995); *Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, Report and Order, 10 F.C.C.R. 7025 (1995), *aff'd sub nom. Connecticut Dep't Pub. Util. Control v. FCC*, 78 F.3d 842 (2d Cir. 1996); *Petition on Behalf of the State of Hawaii, Public Utility*

The FCC held that "given the rapidly evolving market structure in which mobile services are provided," the PUCO had not met its heavy burden of demonstrating that "the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory." *Ohio CMRS Order*, 10 F.C.C.R. at 7843 ¶ 6. In light of the addition of five or six new wireless competitors in almost every market in the decade since the PUCO made its request, as well as the hundreds of new services and innovative rates plans carriers have introduced, the burden imposed on Ohio and other states seeking to increase their involvement in wireless regulation has only gotten heavier.

B. Congress's Deregulatory Scheme Benefits Wireless Competition and CMRS Consumers

Congress's expectation that a uniform national regulatory regime would foster growth and benefit wireless consumers has been borne out. As of December 2002, CMRS providers had over 140 million subscribers and more than 190,000 employees in the United States. *See* Cellular Telecomm. & Internet Ass'n, *Semi-Annual Wireless Industry Survey Results June 1985—December 2002*, *available at* http://www.wow-com.com/industry/stats/surveys/ (last visited June 18, 2003). Wireless carriers have devised flexible rate plans and pricing strategies to attract customers and respond to changes in market demand, and there are more service options available more now than ever before. *See* Dan Meyer, *Carriers Try To Pick up Marginal Users With Cheap Calling Plans*, RCR WIRELESS NEWS, Mar. 11, 2002, at 3. Because new applications such as "Wireless Internet, third generation services, unlicensed wireless network hubs, text messaging and the

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Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, Report and Order, 10 F.C.C.R. 7872 (1995).

introduction of complex games and entertainment products are driving the use of wireless networks" wireless infrastructure spending is expected to rise between four and five percent in the next two to three years. Sam Omatseye, *Uptake in Services Will Require Infrastructure Spending,* RCR WIRELESS NEWS, Apr. 7, 2003, at 16. Today, there are six nationwide mobile telephony operators in the United States and the price wars among those carriers can be fairly characterized "as 'competitive,' 'intense,' and 'aggressive.'" *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 F.C.C.R. 12985, 12990, 13012 (2002).

The FCC's guiding principle in implementing section 332 was that the CMRS market should be "driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs—and not by strategies in the regulatory arena." *CMRS Second Report and Order*, 9 F.C.C.R. at 1420 ¶ 19. This goal is wholly undermined by state actions, such as the PUCO's, that have the potential to force wireless carriers to adhere to fifty plus different sets of rules instead of allowing them to pass on to consumers the savings gained from the exploitation of nationwide business models.

II. THE OHIO SUPREME COURT'S DECISION HAS NATIONAL CONSEQUENCES

The PUCO's decision to rule on a complaint challenging the reasonableness of Petitioner's rates for wireless services was a direct violation of section 332(c)'s express preemption provision and should be reversed. Ohio's defiance of the boundaries drawn by Congress, however, potentially has adverse ramifications far beyond the state's borders and for many more wireless carriers than the petitioner in this case.

If the Ohio Supreme Court's order affirming the state agency's impermissible action is allowed to stand, there is a strong possibility that other states will view it as a green light to implement or enforce policies that similarly fail to respect section 332(c)'s restrictions on their power.

Considered in the context of the goals Congress hoped to accomplish through preemption of state authority over wireless rates and entry, there is little question that the state's residual jurisdiction over "other terms and conditions" must be read narrowly. If Congress's express directive that states have no role in wireless rate or entry regulation is to have any meaning, "rate" and "entry" cannot be considered mere subsets of "*other* terms and conditions."

A. The Ohio Decision Regulates Wireless Rates in Direct Violation of Section 332

The PUCO's actions in the case at bar are not at all close to the line between "rates" and "other terms and conditions." On the contrary, the agency proceeding that gave rise to this case was the adjudication of a complaint directly alleging unreasonable wireless rates, which is unmistakably rate regulation. *See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 432, 440-42 (1907); *see also T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959) (the "crucial question of reasonableness could not be decided by courts"). "To the extent that there is complaint of the unreasonableness of the rate . . . [e]ven if the complaint is that the rate is *discriminatory*," state agencies lack jurisdiction to hear it. *ITT World Communications, Inc. v. New York Tel. Co.*, 381 F. Supp. 113, 119 (S.D.N.Y. 1974) (emphasis in original) (citing *Abilene Cotton*, 204 U.S. at 448); *see also Fedor v. Cingular Wireless Corp.*, No. 01-CV-6849, 2002 U.S. Dist. LEXIS 14786, at *5 (N.D. Ill. Aug. 12, 2002) (challenge to the reasonableness of a wireless carrier's rates is completely preempted by section 332(c)); *Gilmore v. Southwestern Bell*

Mobile Sys., L.L.C., 210 F.R.D. 212, 221 (N.D. Ill. 2001) (questions regarding the reasonableness of rates "are generally within the particular expertise of the FCC and the regulation of such involves exercising agency discretion.").

The PUCO's determination that it was acting under its "other terms and conditions" authority is not supported by the statutory language or the case law interpreting section 332(c). Although the statute's legislative history lists "the requirement that carriers make capacity available on a wholesale basis," among the terms and conditions that states may oversee (H.R. REP. NO. 103-111, at 261) the FCC explicitly rejected the PUCO's attempt to interpret that legislative statement as giving the agency permission "to ensure that wholesale cellular rates [in Ohio] are not below cost through its complaint authority." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43. The FCC explained that "Ohio may not prescribe, set, or fix rates in the future because it has lost authority to regulate 'the rates charged' for CMRS rates . . . ." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43.

Here, the complainant asked the PUCO "to make an outright determination of whether a price charged for a CMRS service was unreasonable," which is precisely what state agencies are "preempted from doing . . . by [s]ection 332." *Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, As Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts From Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) from Violating State Consumer Protection Laws Prohibiting False Advertising and other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated under State Contract and Torts Laws*, Memorandum Opinion and Order, 15 F.C.C.R. 17021, 17035 ¶ 25 (2000). "[A] claim that directly challenges a rate

and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates . . . ." *Spielholz v. Superior Court of Los Angeles County*, 104 Cal. Rptr. 2d 197, 204 (Cal. Ct. App. 2001). It therefore cannot also be considered an effort to regulate "carrier practices, separate and apart from their rates." *Ohio CMRS Order*, 10 F.C.C.R. at 7852 ¶ 43.

B. The Ohio Decision Regulates Wireless Entry in Contravention of Section 332

Although states retain "traditional authority to monitor commercial activities within [their] borders," section 332(c) bars states from imposing requirements on wireless providers that must be satisfied before the provider may legally operate in the state. *Ohio CMRS Order*, 10 F.C.C.R. at 7853 ¶ 44. State law is preempted when it "tread[s] directly on the very areas reserved to the FCC: the modes and conditions under which [a wireless provider] may begin offering service." *Bastien v. AT&T Wireless Servs., Inc.* 205 F.3d 983, 989 (7th Cir. 2000); *see also TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1108 (C.D. Cal. 2002) (express preemption in section 332(c) "prevents second guessing" of FCC criteria for wireless licensing). As the FCC found in rejecting the PUCO's petition seeking to regulate CMRS providers in Ohio, "the statutory language is not broad enough to accommodate Ohio's apparent interest in asserting authority to regulate marketplace entry by CMRS providers." *Ohio CMRS Order*, 10 F.C.C.R. at 7853 ¶ 45.

The FCC has determined that section 332 precludes not only a regulation that directly prohibits entry but also one that "effectively precludes CMRS entry." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9638 ¶ 80 (2001) (citing *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed

Rulemaking, 11 F.C.C.R. 5020, 5072-73 ¶ 111 (1996)); *Aubrey v. Ameritech Mobile Communications, Inc.*, No. 00-CV-75080, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 17, 2002) (section 332(c) preempts states from determining what technology wireless providers must use to serve a particular market). The PUCO's separate subsidiary requirement is impermissible under this standard because it prevents wireless providers in Ohio from lawfully selling their services both to resellers and directly to the public. Indeed, even the PUCO acknowledged that this rule could unreasonably prevent the sale of wireless services—in 1999 it eliminated the separate subsidiary requirement in order "to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization." *Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC LEXIS 745, at *41 ¶ 2 (Dec. 16, 1999).

C. Review by this Court Is Necessary To Prevent the Destruction of Congress' Carefully Balanced Wireless Regulatory Regime

The PUCO has not been alone in its efforts to intrude in areas placed off limits by section 332(c). A number of other states, as well as courts adjudicating state-law causes of action, also have taken actions in recent years that conflate the line between "rate and entry" and "other terms and conditions."

For example, both state and federal courts often permit the "other terms and conditions" exception of section 332(c) to swallow the provision's express preemption directive by refusing to bar lawsuits so long as plaintiffs cast their state-law claims for restitution in terms of fraud, unfair practices, or non-disclosure. *See, e.g., Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421, 423 (D. Md. 2000) ("late fees are not included in 'rates' of service, but rather are part

of the 'other terms and conditions' of service" because late fees are intended to act as a penalty for late payment); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541 (D.N.J. 1996) (award of monetary damages based on state deceptive advertising or non-disclosure claims is not rate regulation); *Lee v. Contel Cellular of the South, Inc.*, No. CV-95-1057-JH, 1996 U.S. Dist. LEXIS 19636 (S.D. Ala. Nov. 25, 1996) (assessment of "rounding" practice in calculating bills is unlawful rate regulation under section 332(c), but state fraud and deceptive practices claims asking for the same relief implicate "other terms and conditions"); *Bryceland v. AT&T Corp.*, No. 05-01-00552-CV, 2002 Tex. App. LEXIS 8511 (Tex. App. Dec. 3, 2002) (fraud, deceptive practices and breach of contract are not preempted); *Ball v. GTE Mobilnet of California*, 96 Cal. Rptr. 2d 801 (Cal. Ct. App. 2000) (state unfair business practice claims relating to inadequate disclosure or misrepresentation not preempted). In declining to preempt the state-law complaints, these decisions ignore the guidance provided by this Court that the "rates charged by" language of the Communications Act must be construed broadly. *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("[R]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.").

Some state regulators also have begun to assert their authority over wireless rates and entry in the guise of "consumer protection." The California Public Utilities Commission, for instance, recently proposed sweeping regulations that would, among other things, dictate the maximum level of late payment charges, excuse customers from paying early termination fees, mandate the payment of five percent interest on the monthly unused balance of a customer deposit, and require wireless carriers to seek the state commission's approval before introducing any new services with "privacy

implications." *See* Rulemaking 00-02-004, *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities*, Draft Decision of Commissioner Wood (Cal. PUC June 6, 2002) ("*California Draft Decision*"). Other states are watching California's actions carefully and, absent a clear directive from this Court, there exists the strong probability that wireless carriers will be sucked into the traditional state-by-state regulatory regime that Congress sought to "dramatically revise" a decade ago.

Congress preempted a patchwork of state regulatory schemes because, as one court has explained, "'the risk of fifty different states articulating fifty different rules' . . . conflicts with Congress's objectives of achieving national uniformity in wireless telecommunications services . . . ." *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 248 F. Supp. 2d 452, 463 (D. Md. 2003) (quoting *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 216 F. Supp. 2d 474, 491 (D. Md. 2002)). In light of the conflict among the courts on this issue and the potential for further over-stepping by all states, not just Ohio, review by this Court is necessary to clarify the boundary beyond which states may not stray.

III. THE OHIO SUPREME COURT'S DECISION CONFLICTS WITH CONGRESSIONAL GOALS

Even if the PUCO's actions were not expressly preempted under section 332(c), they are not permissible because they directly conflict with "the careful regulatory scheme established by federal law." *United States v. Locke*, 529 U.S. 89, 106-07 (2000); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000); *see also Central Office Tel., Inc.*, 524 U.S. at 227-28. Federal regulations preempt state law to the extent there is an "actual conflict" between the two regimes. *Geier*, 529 U.S. at 871-72. The Supremacy Clause

invalidates not only conflicting state laws "that make it 'impossible' for private parties to comply with both state and federal law," it nullifies state laws "that prevent or frustrate the accomplishment of a federal objective." *Id.* at 873-74; *see also TPS Utilicom Servs., Inc.*, 223 F. Supp. 2d at 1109 (lawsuit involving FCC auction of spectrum licenses pre-empted because it "would interfere with Congress's full purpose and objectives under the [Communications Act]").

The FCC, in implementing the Communications Act, has twice *rejected* the same kind of separate wholesale/retail subsidiary requirement established by the PUCO and to which Petitioner was found by the Ohio Supreme Court to have violated. *See Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 F.C.C.R. 1719, 1725 ¶ 52 (1991) ("*Resale NPRM and Order*"); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 F.C.C.R. 18455, 18462-63 ¶ 12 (1996) ("*CMRS Interconnection Order*"). In declining to adopt a separate affiliate requirement, the FCC noted that it would not "be wise policy at this time to consider the need for separate accounting for wholesale/retail operations, regulate wholesale rates of return or require that rate cards be filed with the Commission." *Resale NPRM and Order*, 6 F.C.C.R. at 1725 ¶ 52. The FCC found that imposing such requirements on wireless providers "could lead to pricing distortion, including possible higher prices" and undermine its goals of "encouraging entry and promoting competition in the marketplace." *Id.* at 1722, 1725 ¶¶ 23, 53; *CMRS Interconnection Order*, 11 F.C.C.R. at 18462 ¶ 12 (reaffirming its previous ruling that "the rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures . . . .").

In *Geier*, this Court, noting that the Department of Transportation had previously "*rejected*" the very standard plaintiff sought to apply in her lawsuit, concluded that "a rule of state tort law imposing such a duty . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*, 529 U.S. at 879, 881 (emphasis in original). The FCC, likewise, made a deliberate decision to leave wireless services free from traditional separation requirements because such regulations would "be counterproductive" to the FCC's goals and had the potential to "circumvent competition-driven investment" in the wireless market. *Resale Order and NPRM*, 6 F.C.C.R. at 1725 ¶ 53. The PUCO's separate subsidiary requirement, accordingly, is preempted "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Ohio's intrusion into wireless ratemaking also conflicts with explicit congressional intent. As discussed above, Congress created a "uniform national policy" to "promote competition for wireless services" and to avoid "State regulation [that may] be a barrier to the development of competition in the market." H.R. REP. NO. 103-213, at 480-81 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 1169-70 (incorporating the findings of S.335, 103d CONG. (1993)); H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587. In implementing section 332(c), the FCC similarly sought to ensure that its regulations would be "perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services rather than as a burden standing in the way of entrepreneurial opportunities." *CMRS Second Report and Order*, 9 F.C.C.R. at 1421 ¶ 22. The PUCO's broad foray into wireless regulation, by contrast, threatens to create a competition-inhibiting "policy that is balkanized state-by-state." *Ohio CMRS Order*, 10 F.C.C.R.

at 7852 ¶ 14. As such, neither the PUCO's order nor the Ohio Supreme Court's affirming decision can coexist with the explicit congressional objectives expressed in section 332(c) and the FCC's wireless policies.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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